

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Choice Communications LLC	)	
	)	CC Docket No. 96-45
Petition for Designation as an Eligible	)	
Telecommunications Carrier in the	)	
United States Virgin Islands	)	

**OPPOSITION OF THE VIRGIN ISLANDS TELEPHONE COMPANY D/B/A  
INNOVATIVE TELEPHONE**

Gregory J. Vogt  
Rebekah P. Goodheart  
Amy E. Bender  
WILEY REIN & FIELDING LLP  
1776 K Street, NW  
Washington, DC 20006  
202.719.7000

*Counsel to Innovative Telephone*

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The Virgin Islands Telephone Company d/b/a Innovative Telephone (“Innovative”), the rural incumbent local exchange carrier in the U.S. Virgin Islands, by its attorneys, hereby files this Opposition to Choice Communications LLC’s (“Choice”) Petition for Designation as an Eligible Telecommunications Carrier (“ETC”) in the U.S. Virgin Islands.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY.**

Section 214(e) of the Telecommunications Act of 1996 (“Act”) establishes a mechanism for granting ETC status, which is necessary for a common carrier to receive Federal universal service support. Innovative Telephone is the rural incumbent local exchange carrier (“ILEC”) in the U.S. Virgin Islands and is designated as an ETC for the territory.<sup>2</sup> By its application, Choice seeks to be designated as the second ETC in the U.S. Virgin Islands.

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<sup>1</sup> *Petition for Designation as an Eligible Telecommunications Carrier in the United States Virgin Islands* of Choice Communications LLC, CC Dkt. No. 96-45 (filed Jan. 13, 2005) (“Choice Application” or “Application”).

<sup>2</sup> As of December 31, 2004, Innovative had 69,926 access lines in the U.S. Virgin Islands and is classified as a rural telephone company under 47 C.F.R. § 51.5.

The Act creates two separate standards for granting ETC status: (1) a test for applicants seeking designation in non-rural areas; and (2) a test for applicants seeking designation in an area served by a rural telecommunications carrier. For non-rural areas, the Act *requires* that a state commission grant ETC status if the applicant demonstrates that it is a telecommunications carrier and provides or will provide and advertise the nine supported telecommunications services. By contrast, in rural areas, the Act specifies that a state commission *may*, but is *not* required to, grant ETC status if the applicant demonstrates that it is a telecommunications carrier, provides or will provide and advertise the nine supported telecommunications services *and* that the applicant proves that granting the application is in the public interest. In so doing, the Act makes clear it is consistent with the public interest to have one ETC in a rural territory.<sup>3</sup>

In this case, because Choice is requesting ETC status in a rural territory, the Federal Communications Commission (“FCC” or “Commission”) is bound to apply the Act’s heightened criteria for an application requesting ETC status in the territory of a rural ILEC.<sup>4</sup> Thus, Choice faces a high burden of proof of establishing that its Application satisfies the statutory criteria and is in the public interest.

Today, the regulatory criteria for evaluating ETC applications and the rural public interest standard is in flux and likely will be changed to create a more rigorous set of criteria in

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<sup>3</sup> Innovative embraces its ETC obligation and remains committed to providing universal service to all consumers in the U.S. Virgin Islands if economically feasible. Innovative understands and accommodates competition from a number of different providers. Innovative’s concerns herein stem from the increasing pressure on the universal service fund, which could threaten Innovative’s ability to provide affordable supported telecommunications services to the Virgin Islands—where the per capita income is much lower than the U.S. mainland. Although residential rates are \$22.00, the penetration rate is lower than the U.S. mainland not because service is unavailable, but because residents cannot afford service.

<sup>4</sup> The Commission is ruling on Choice’s Application instead of the Virgin Islands Public Services Commission (“VIPSC”) because the VIPSC found that it had no jurisdiction. *Choice Application* at Ex. 3.

matter of days. Specifically, in response to the increasing strains on the universal service fund, the Federal-State Joint Board on Universal Service (“Joint Board”) released a Recommended Decision on February 27, 2004, which urged the Commission to adopt a “rigorous” evaluation criteria for all ETC applicants and a more stringent public interest analysis for rural areas.<sup>5</sup> Because the FCC’s decision implementing the Joint Board’s recommendation has a statutory deadline of February 27, 2005—it is premature and an inefficient use of the Commission’s resources to evaluate Choice’s Application under a soon-to-be-replaced standard.

Nonetheless, whether the Commission evaluates Choice’s Application under the current standard or under the Joint Board’s more rigorous standard, it is clear that Choice has failed to carry its burden of proving that it is a common carrier, that it provides or will provide and advertise the supported services, and that its application is in the public interest. While Choice’s Application is crafted to imply that it includes the proper commitments, an examination of Choice’s (1) paltry evidentiary support, (2) actual service offerings, and (3) representations to the VIPSC, reveals that these statements are misleading and unsupported.

Choice has not shown that it provides *any* supported telecommunications services today and fails to submit any detailed evidence documenting how or when it will provide each service. Indeed, Choice’s own employees stated on three separate occasions to a U.S. Virgin Islands businessperson that Choice *does not provide any wireless or wireline voice-grade telephone service to interested customers in the U.S. Virgin Islands.*<sup>6</sup> Choice is thus asking the FCC to take

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<sup>5</sup> *Federal-State Joint Board on Universal Service*, Recommended Decision, 19 FCC Rcd 4257 (Jt. Bd. 2004) (emphasis added) (“*Recommended Decision*”).

<sup>6</sup> Declaration of Donald E. Parrish on Behalf of Innovative Telephone, *Petition for Designation as an Eligible Telecommunications Carrier in the United States Virgin Islands* of Choice Communications LLC, CC Dkt. No. 96-45 (filed Feb. 23, 2005) (“Parrish Declaration”) (attached hereto as Exhibit 1 (“Ex. 1”)).

the unprecedented step of awarding it ETC status in the territory of a rural ILEC when Choice's Application fails to demonstrate that it provides *any* of the required supported telecommunications services. For the foregoing reasons and as detailed herein, Innovative respectfully urges the Commission to deny Choice's deficient Application.

**II. THE FCC SHOULD HOLD CHOICE'S APPLICATION IN ABEYANCE UNTIL THE FCC RELEASES ITS DECISION ON THE JOINT BOARD'S RECOMMENDATION.**

On February 27, 2004, the Joint Board released its Recommended Decision "strongly" recommending that the Commission revise the ETC designation and require a "*rigorous* [ETC] application process" to ensure that each designated ETC is "prepared to serve all customers within a designated service area" and is "willing to be the sole ETC should other ETCs withdraw from the market."<sup>7</sup>

The Joint Board also commented on the Act's heightened standard to obtain ETC status in rural areas. In particular, the Joint Board recommended that state commissions "apply a *particularly rigorous standard* to the minimum qualifications of applicants seeking ETC designation in *rural carrier service areas*."<sup>8</sup> The Joint Board noted that such "rigorous" designation standards "should improve the long-term sustainability of the universal service fund, as *only full qualified carriers* that are *capable* of, and *committed* to, providing universal service would be eligible to receive support."<sup>9</sup>

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<sup>7</sup> *Federal-State Joint Board on Universal Service*, Recommended Decision, 19 FCC Rcd 4257, 4258, 4561 (¶¶ 2, 11) (Jt. Bd. 2004) (emphasis added) ("*Recommended Decision*").

<sup>8</sup> *Id.* at 4263-64 (¶ 17) (emphasis added).

<sup>9</sup> *Id.* at 4261 (¶ 9) (emphasis added). As an example, the Joint Board found that *all* ETC applicants should demonstrate that they have: (1) "the financial resources and ability to provide quality services throughout the designated service area"; (2) the commitment and ability to provide supported services, by requiring a "formal build-out plan for areas where facilities had not yet been built"; (3) demonstrate the ability to remain functional in emergency situations; (4)

Pursuant to Section 254(a)(2) of the Act, the Commission has a statutory obligation to implement the Joint Board's recommendation by February 27, 2005.<sup>10</sup> As Chairman Powell stated, the Joint Board's revisions are necessary to provide "much-needed regulatory certainty [to] this area."<sup>11</sup> Given the immediacy of the Commission's pending decision, it is neither in the public interest nor an efficient use of the Commission's scarce resources to review an ETC application under a standard that, in all likelihood, will be revamped during the comment cycle of Choice's Application. Instead, the Commission should conduct a new briefing schedule after the Commission's decision implementing the Joint Board's recommendation has been released and becomes final.

### **III. CHOICE FAILS TO MEET THE REQUIREMENTS FOR ETC DESIGNATION.**

In the event that the FCC does not defer consideration of Choice's Application until the Commission releases its decision on the Joint Board's recommendation, there is no question that Choice's ETC Application must be denied under the current standard.

Under the Act, no state commission (or the FCC when it acts on behalf of a state commission) can grant ETC status unless an applicant demonstrates that it is a common carrier and offers or provides documentation that it will offer and advertise the services required by the

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demonstrate that it satisfies any consumer protection requirements; and (5) provide a minimum amount of local usage as part of their basic package of supported services. *Id.* at 4266 (¶¶ 22, 24-36). In addition, under the Joint Board's recommendation, an ETC applicant in a rural area—such as the instant petition by Choice—must demonstrate a heightened standard of public interest, including a consideration of the level of federal high-cost support to be received by ETCs. *Id.* at 4274-75 (¶¶ 43-45). Choice fails to provide any such evidence.

<sup>10</sup> 47 U.S.C. § 254(a)(2) ("the Commission shall complete any proceeding to implement ... recommendations from any Joint Board on universal service within one year after receiving such recommendations").

<sup>11</sup> See *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1591, Separate Statement of Chairman Michael K. Powell (2004) ("*Virginia Cellular Order*").

Commission's universal service rules.<sup>12</sup> As demonstrated below, Choice does not satisfy these requirements and its Application should be denied.

**A. Choice Fails to Establish That It Is A Common Carrier.**

The fundamental requirement that an ETC applicant be a common carrier is unwavering. The Act plainly states that, to obtain ETC designation, a carrier must be a *common carrier*.<sup>13</sup> Choice's Application appears to gloss over this initial prerequisite and focuses instead on the supported services, commitments and advertising requirements. Choice has submitted no evidence to support the conclusion that it is a common carrier, let alone a telecommunications carrier. Choice is not a CMRS carrier, nor does the evidence indicate that Choice offers any wireless or wireline telephone services to the public.<sup>14</sup> Choice's failure to demonstrate that it is a common carrier renders its Application flawed and necessitates denial.<sup>15</sup>

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<sup>12</sup> Moreover, as noted below, Choice seeks to become the second ETC in a rural area, and therefore faces a heavy burden to meet the Act's public interest standard. *See pp. 19-34, infra.*

<sup>13</sup> 47 U.S.C. § 214(e). Under the Commission's rules, if a carrier provides a combination of telecommunications and non-telecommunications services, such carriers are treated as "common carriers" only "to the extent they are acting as telecommunications carriers." *See* 47 C.F.R. § 51.5. Common carriers have unique regulatory obligations. Among other things, Title II of the Communications Act requires that common carriers: provide service on just, reasonable, and nondiscriminatory rates and terms; contribute to the universal service fund; provide access to law enforcement for authorized wiretapping pursuant to the Communications Assistance for Law Enforcement Act ("CALEA"); comply with tariffing requirements for so-called "dominant" carriers; comply with interconnection obligations; and comply with disability accessibility requirements; and to comply with privacy requirements. 47 U.S.C. §§ 201, 202, 203, 251, 229; *see also Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7460 (n.16) (2004).

<sup>14</sup> *See* Parrish Declaration at 1-2 (Ex. 1). Choice appears to claim that it is a competitive local exchange carrier ("CLEC"), but does not demonstrate that it offers any services to qualify as a local exchange carrier. *Choice Application* at 2.

<sup>15</sup> Because Choice ignores this initial showing, Choice does not submit any proof that it is a common carrier, or complies with the FCC's requirements for common carriers, which include (1) making annual contributions to the universal service fund, 47 C.F.R. §§ 54.706(a) & (b); (2) making annual contribution to the NANPA and LNPA funds, 47 C.F.R. § 52.16 (NANPA) and



**B. Choice Does Not Provide Any Of The Supported Services As Required By Section 214(E)(1)(A), And Offers No Evidence That It Will Provide These Services In The Future.**

1. The Commission Requires An ETC Applicant To Either Demonstrate That It Offers Or Will Offer The Supported Services.

ETC applicants bear the burden of proof to “demonstrat[e] through the required certifications and related filings, that it now offers or will offer upon designation as an ETC, the services supported by the federal universal service support mechanism.”<sup>16</sup> Specifically, Section 214(e)(1)(A) of the Act requires that ETC applicants “offer the services that are supported by Federal universal service support mechanisms under section 254(c) ... either using its own facilities or a combination of its own facilities and resale of another carrier’s services ... .”<sup>17</sup> Section 54.101(a) of the Commission’s rules defines the supported telecommunications services as: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multifrequency (“DTMF”) signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers.<sup>18</sup>

The Commission places the burden on ETC applicants to prove that they offer or will offer shortly the supported services. This is necessary, according to the Joint Board, to ensure

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§ 52.32 (LNPA); (3) making contributions to the TRS fund, if the carrier provides interstate services (including paging, cellular and PCS services), on the basis of interstate end user telecommunications revenues, 47 C.F.R. § 64.604(c)(iii)(A); and (4) paying regulatory fees on an annual basis, 47 C.F.R. § 1.1157(b)(1). All evidence indicates that Choice is not a common carrier, but an information service provider.

<sup>16</sup> *Virginia Cellular Order* at 1570 (¶ 14); *see also* 47 U.S.C. § 214(e)(1).

<sup>17</sup> 47 U.S.C. § 241(e)(1)(A).

<sup>18</sup> 47 C.F.R. § 54.101(a).

that “only fully qualified applicants receive designation as ETCs and the ETC designees are prepared to serve all customers within the designated service areas.”<sup>19</sup> To meet this burden, ETC applicants cannot rely on “vague assertion[s],” but must provide firm evidence that they are capable of and committed to providing the supported telecommunications services.<sup>20</sup> Examples of such concrete evidence include: (1) interconnection agreements with both local exchange carriers and interexchange carriers;<sup>21</sup> (2) roaming or other contractual agreements with wireless carriers;<sup>22</sup> (3) leases for facilities;<sup>23</sup> (4) maps of the proposed ETC service area including the locations of proposed facilities;<sup>24</sup> and (5) local calling plans and rates.<sup>25</sup>

In an effort to address the growing size of the fund, the Commission, in the 2004 *Virginia Cellular Order*, created a heightened burden for ETC applicants—especially for applicants in

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<sup>19</sup> *Recommended Decision* at 4261 (¶ 9).

<sup>20</sup> *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168, 15178 (¶ 29) (2000) (“*Western Wireless Decision*”).

<sup>21</sup> *Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia* of Virginia Cellular LLC, CC Dkt. No. 96-45 at 5, 8 (filed Apr. 26, 2003) (“*Virginia Cellular Petition*”); *Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia* of Highland Cellular, Inc., CC Dkt. No. 96-45 at 5, 7 (filed Sept. 19, 2003) (“*Highland Cellular Petition*”); *Petition for Designation as an Eligible Telecommunications Carrier on the Island of Saipan in the Commonwealth of the Northern Mariana Islands* of Guam Cellular and Paging, Inc. d/b/a/ Saipancell, CC Dkt. No. 96-45 at 5, 8 (filed Feb. 19, 2002) (“*Saipancell Petition*”); *Application for Designation as an Eligible Telecommunications Carrier in the State of Tennessee* of Advantage Cellular Systems, Inc., CC Dkt. No. 96-45 at 9-10, 13 (filed May 9, 2003) (“*Advantage Cellular Petition*”).

<sup>22</sup> *Supplement to Petition of Advantage Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Tennessee* of Advantage Cellular Systems, Inc., CC Dkt. No. 96-45 at 5, 11-12 (filed Feb. 17, 2004).

<sup>23</sup> *Second Supplement to Application for Designation as an Eligible Telecommunications Carrier in the State of Tennessee* of Advantage Cellular Systems, Inc., CC Dkt. No. 96-45 at 2-3 (filed May 18, 2004) (“*Advantage Cellular Second Supplement*”).

<sup>24</sup> *Advantage Cellular Second Supplement* at Ex. B.

<sup>25</sup> *Advantage Cellular Petition* at Ex. F.

rural areas—to ensure that applicants will provide the supported services in a timely and acceptable manner.<sup>26</sup> Since the *Virginia Cellular Order*, for example, carriers relying on wireless technology to obtain ETC status have committed to the following obligations as preconditions to obtaining ETC status: (1) annual reporting of progress in completing build-out plans, responding to unfulfilled service requests, and resolving complaints per 1,000 handsets; (2) specific commitments to provide service to requesting customers in the area for which it is designated, including those areas outside existing network coverage; and (3) specific commitments to construct new cell sites in areas outside its network coverage.<sup>27</sup>

Choice claims that it “need not currently provide the supported services today in order to be fully eligible to be designated as an ETC in the U.S. Virgin Islands.”<sup>28</sup> While the FCC has recognized that an applicant may not provide *all* of the supported services at the time the ETC application is filed, an applicant must offer documented evidence that it will provide service within a reasonable timeframe. Further, Innovative can find no Commission precedent in which the FCC granted ETC status where, as here, the applicant provides *none* of the supported telecommunications services.

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<sup>26</sup> *Virginia Cellular Order* at 1570-71 (¶¶ 15-16).

<sup>27</sup> *See id.*; *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunication Carrier in the State of Virginia*, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6429-30 (¶¶ 16-17) (2004) (“*Highland Cellular Order*”); *NPCR, Inc. d/b/a/ Nextel Partners, Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama*, Order, 19 FCC Rcd 16530, 16535 (¶ 11) (WCB 2004) (“*Nextel Partners Order*”); *Advantage Cellular Systems, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee*, Order, 19 FCC Rcd 20985, 20989-90 (¶ 12) (WCB 2004) (“*Advantage Cellular Order*”), *Guam Cellular and Paging, Inc. d/b/a/ Saipancell, Petition for Designation as an Eligible Telecommunications Carrier on the Islands of Saipan, Tinian, and Rota in the Commonwealth of the Northern Mariana Islands*, Order, 19 FCC Rcd 13872, 13876 (¶ 11) (WCB 2004) (“*Saipancell Order*”).

<sup>28</sup> *Choice Application* at 8.

Similarly, the Commission’s rules permit applicants that satisfy the majority of the ETC requirements to request a waiver for three of the required services—namely, (1) single-party service, (2) access to enhanced 911 service, or (3) toll limitation<sup>29</sup>—in order to be eligible to receive universal support while it completes network upgrades necessary to offer these specific services.<sup>30</sup> However, to obtain such a waiver, an applicant “must demonstrate that exceptional circumstances exist” to warrant the grant of the waiver.<sup>31</sup> Choice neither requested a waiver of the requirements nor demonstrated that any “exceptional circumstances” exist here.

2. Choice Fails To Demonstrate That It Provides Or Will Provide Any Of The Supported Services.

Choice falls far short of the burden of proof required to obtain ETC status. In contrast to other ETC applications, Choice provides no more than bald assertions that it “offers—or will offer after designation as an ETC—all of the services and functionalities set out in the Commission’s rules.”<sup>32</sup> Choice fails to explain what it “offers” today much less how it “will offer” the supported telecommunications services “after designation as an ETC.”<sup>33</sup> Choice does not even reference let alone attempt to demonstrate compliance with the guidelines proposed by the Joint Board.

Moreover, Choice cannot qualify for ETC status because the services it highlights in its Application—wireless cable, wireless internet and paging service—are not the supported

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<sup>29</sup> 47 C.F.R. § 54.101(c).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Choice Application* at 10.

<sup>33</sup> Because Choice’s Application lacks the required showings, the Commission should serve interrogatories on Choice and ask for public comment on Choice’s response. Proposed interrogatories are attached hereto as Exhibit 2 (“Ex. 2”).

telecommunications services required by Section 214(e)(1)(A) of the Act and Section 54.101(a) of the Commission's rules.<sup>34</sup> Whereas alleged deficiencies in other ETC applications focused on whether the wireless carrier's service was the subject of "dropped calls" or "poor coverage" and whether the applicants had made additional commitments to provide quality service and expand coverage, Choice neglects to include any evidence that it actually provides *any* supported telecommunications service using either wireless or wireline technology.

As detailed below, Choice fails to meet its burden with respect to each of the following services and commitments.

1. *Voice Grade Access to the Public Switched Network.*<sup>35</sup> Choice alleges that that it "provides access to the PSTN" on its Specialized Mobile Radio ("SMR") system.<sup>36</sup> However,

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<sup>34</sup> Tellingly, all of the advertisements submitted as part of its Application are for information services—not one is for a telecommunications service. *See* p. 19, *infra*.

<sup>35</sup> "'Voice grade access' is defined as a functionality that enables a user of telecommunications services to transmit voice communications, including signalling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call." 47 C.F.R. § 54.101(a)(1).

<sup>36</sup> *Choice Application* at 11. Choice also claims that it "has provided" single-party service, one of the supported services, through its SMR system and targeted radio service, and that it "will provide" single-party services by using fixed wireless equipment and by reselling wireline facilities. *Id.*; *see also* 47 C.F.R. § 54.101(a)(4) ("'Single-party service' is telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission."). However, Choice provides no documentation to support its claims. Moreover, its statements contradict its previous representations to the VIPSC that it does not provide such service. *Interim Decision of Hearing Examiner*, VIPSC Dkt. No. 548 at A5 (Sept. 4, 2003) ("*Hearing Examiner Interim Decision*") (attached hereto as Exhibit 3 ("Ex. 3")). In fact, unsuccessful attempts by a businessperson in the U.S. Virgin Islands to obtain telecommunications service from Choice reveal that Choice does not provide voice telecommunications service. Parrish Declaration at 1-2 (Ex. 1).

Although Choice requested in the VIPSC proceeding that it be afforded additional time under Section 54.101(c) to implement such service, the Hearing Examiner found that Choice failed to demonstrate that "exceptional circumstances" existed to warrant an extension. *Hearing Examiner Interim Decision* at A6 (Ex. 3); *see also Requests of Choice Communications Requiring Vitelco to Tariff and Offer DS3 Service and for Certification as an Eligible*

Choice has no interconnection agreement or resale agreement with Innovative—raising questions on how Choice offers voice grade access to the PSTN.<sup>37</sup>

While Choice touts its SMR service throughout its Application in support of its eligibility for ETC status, Choice neglects to describe its SMR system, does not state that it provides two-way voice using its SMR, and fails to identify the types of service it currently provides using SMR. As the FCC is aware, SMR need not be used to provide voice service, but it can be used for taxicab and other dispatch service. Choice's website asks users to "call Choice" to find out whether "SMR is right for your business."<sup>38</sup> In response, when a local businessperson made three separate inquiries to Choice to inquire about Choice's voice-grade offerings, three Choice employees stated that Choice does not offer any wireless or wireline telephone service in the U.S. Virgin Islands. Choice does not demonstrate that it uses SMR to provide voice-grade access as required to obtain ETC status.

Similarly, Choice states that it has the "capability" to offer fixed wireless local loop. However, Choice does not claim that it does offer such services, nor does it provide evidence documenting its alleged capabilities. Instead, Choice highlights equipment for its ISP business,<sup>39</sup>

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*Telecommunications Carrier*, Order, VIPSC Dkt. No. 548, Order No. 19/2004 at 1-2 (May 5, 2004) ("VIPSC ETC Order") (attached hereto as Exhibit 4 ("Ex. 4")) (adopting the Hearing Examiner's findings). Choice has not even requested a waiver in the current Application.

<sup>37</sup> The VIPSC approved an arbitrated interconnection and resale agreement between Innovative and Wireless World, the predecessor in interest to Choice, four years ago. Choice has stated that it will not sign the arbitrated agreement. See Oral Argument at 61, *Wireless World v. Innovative Communications Corporation*, Civ. No. 2002-0061 (D.P.R. Sept. 15, 2004). The relevant pages are attached hereto as Exhibit 5 ("Ex. 5").

<sup>38</sup> *Choice Communications*, available at <http://www.choicetv.vi/index.php?pn=L21vYmlsZS9zbXJzX3R4dC5waHA> (last visited Feb. 16, 2005). Exhibit 6 ("Ex. 6") contains copies of the relevant pages of Choice's website.

<sup>39</sup> *Choice Application* at 14.

which is not a supported telecommunications service, and refers to a Sonus switch that is not located in the U.S. Virgin Islands, but on the U.S. mainland.<sup>40</sup> Choice fails to explain how it would route calls from the U.S. mainland to the U.S. Virgin Islands. Even assuming that Choice did provide such documentation, routing traffic to a switch thousands of miles away raises serious reliability concerns particularly during hurricanes and other severe storms that are common in the region. Reliability of service is a factor that the Commission considers as part of its ETC analysis to ensure that applicants will provide high-quality services.<sup>41</sup>

2. *DTMF signaling or its functional equivalent.*<sup>42</sup> Choice concedes that it does not offer DTMF signaling.<sup>43</sup> Instead, Choice relies on statements that: (1) it is “evaluating” whether to install a switch to provide such services;<sup>44</sup> and (2) that its parent company owns a switch on the U.S. mainland.<sup>45</sup> Choice’s commitment to provide DTMF falls short of the required burden. Unlike other applicants, Choice provides no actual plans or cost estimates for installing a switch.<sup>46</sup> And, as noted above, routing traffic through a switch thousands of miles away raises serious reliability concerns.

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<sup>40</sup> *Id.* Choice’s claim that it will rely on a switch not even located in the U.S. Virgin Islands also underscores one of the deficiencies in its Application: it is not committed to provide the supported telecommunications services in the U.S. Virgin Islands.

<sup>41</sup> *See e.g., Virginia Cellular Order* at 1573 (¶ 23).

<sup>42</sup> “‘Dual tone multi-frequency’ (DTMF) is a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time.” 47 C.F.R. § 54.101(a)(3).

<sup>43</sup> *Choice Application* at 11-12.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 11-12, 14.

<sup>46</sup> *See, e.g., Updates to Supplements to ETC Petitions for Pennsylvania, New York, Alabama, Virginia, Tennessee, Georgia, and Florida* of Nextel Partners, CC Dkt. No. 96-45 (filed June 2, 2004) (“*Nextel Updates to Supplement*”); Letter from David A. LaFuria, Counsel to

3. *Access to Emergency Services*.<sup>47</sup> Choice has no interconnection or resale agreement in place with Innovative. Therefore, its claim that it provides access to “911” services through the PSTN from its SMR handset is unsupported and unproven.<sup>48</sup>

4. *Access to Operator Services*<sup>49</sup> and *Access to Directory Assistance*.<sup>50</sup> Choice alleges that it provides access to operator services and directory services.<sup>51</sup> Choice relies on its ISP help desk technicians as evidence of this commitment,<sup>52</sup> but it offers no evidence that ISP help desk technicians could or would be able to offer operator services and directory assistance 24 per hours day, 7 days per week. In the VIPSC proceeding, the VIPSC found that there was “no evidence” that Choice offers access to those services.<sup>53</sup> Choice failed to offer any new evidence

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Saipancell to Marlene H. Dortch, Secretary, FCC at Ex. A, CC Dkt. No. 96-45 (dated June 14, 2004) (“*Saipancell Letter*”).

<sup>47</sup> “‘Access to emergency services’ includes access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code ‘911,’ to call emergency services through a Public Service Access Point (PSAP) operated by the local government. ‘Enhanced 911’ is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. ‘Access to emergency services’ includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier’s service area has implemented 911 or enhanced 911 systems.” 47 C.F.R. § 54.101(a)(5).

<sup>48</sup> *Choice Application* at 12-13.

<sup>49</sup> “‘Access to operator services’ is defined as access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call.” 47 C.F.R. § 54.101(a)(6).

<sup>50</sup> “‘Access to directory assistance’ is defined as access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings.” 47 C.F.R. § 54.101(a)(8).

<sup>51</sup> *Choice Application* at 13.

<sup>52</sup> *Choice Application* at 13.

<sup>53</sup> *VIPSC ETC Order* at 1-2 (Ex. 4); *Hearing Examiner Interim Decision* at A5 (Ex. 3).



or cite any change in circumstances since that proceeding. Further, as noted above, Choice does not appear to have access to the PSTN. Therefore, Choice has not shown how or if it has access to operator services and directory assistance.

5. *Access to Interexchange Services*<sup>54</sup> and *Local Usage*.<sup>55</sup> Choice claims that it can provide access to interexchange services,<sup>56</sup> but fails to explain how it does so. Moreover, in the VIPSC proceeding, the VIPSC adopted the Hearing Examiner's finding that there is "no evidence" that Choice offers access to interexchange services.<sup>57</sup> Choice failed to provide any additional evidence here to demonstrate that circumstances have changed since the VIPSC's order.

With respect to local usage, Choice does not explain how it plans to offer local usage. It does not offer voice-grade service today and Choice has no interconnection agreement in place with Innovative. Therefore, it is unclear how it will be able to offer such service.<sup>58</sup>

6. *Toll limitation for Qualifying Low Income Customers*.<sup>59</sup> Choice concedes that it does not currently provide toll limitation service.<sup>60</sup> Although Choice implies that it will "establish toll

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<sup>54</sup> "‘Access to interexchange service’ is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network." 47 C.F.R. § 54.101(a)(7).

<sup>55</sup> "‘Local usage’ means an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users." 47 C.F.R. § 54.101(a)(2).

<sup>56</sup> *Choice Application* at 13.

<sup>57</sup> *VIPSC ETC Order* at 1-2 (Ex. 4); *Hearing Examiner Interim Decision* at A5 (Ex. 3).

<sup>58</sup> *Choice Application* at 13.

<sup>59</sup> "‘Toll limitation’ denotes either toll blocking or toll control for eligible telecommunications carriers that are incapable of providing both services. For eligible telecommunications carriers that are capable of providing both services, ‘toll limitation’ denotes both toll blocking and toll control." 47 C.F.R. § 54.400(d). "‘Toll blocking’ is a service provided

limitation capability ... in its Sonus switch”<sup>61</sup>—presumably the switch owned by its parent company on the U.S. mainland—it offers no evidence to support this claim. In addition, Choice does not commit to comply with Lifeline and Link-Up obligations. In the absence of VIPSC jurisdiction over Choice’s services, Choice does not explain how it will fulfill low-income service obligations and contribute to the local Lifeline and Link-Up fund as required by the VIPSC.

Thus, Choice has neither demonstrated that it can or will provide toll limitation service, nor requested a waiver and demonstrated that “extraordinary circumstances exist” under Section 54.101(c), for additional time to implement this service.<sup>62</sup> Therefore, its Application must be denied.

7. *Additional Commitments.* The FCC has made clear that it will evaluate whether an ETC applicant has made specific additional commitments, as required in the *Virginia Cellular Order* and subsequent rural ETC applications, to determine whether an applicant (1) will offer the supported services, and (2) will do so in a timely and acceptable manner. Choice pays nothing more than lip service to these commitments.

Whereas other ETC applicants provided detailed plans for upgrading facilities and constructing new facilities, which included the timeframe for commencement and completion of

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by carriers that lets consumers elect not to allow the completion of outgoing toll calls from their telecommunications channel. 47 C.F.R. § 54.400(b) “‘Toll control’ is a service provided by carriers that allows consumers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle. 47 C.F.R. § 54.400(c).

<sup>60</sup> *Choice Application* at 14.

<sup>61</sup> *Id.*

<sup>62</sup> Even if it had sought a waiver, the VIPSC found that no “extraordinary circumstances” existed to support the grant of such waiver. *Hearing Examiner Interim Decision* at A6 (Ex. 3). The VIPSC adopted the Hearing Examiner’s findings. *VIPSC ETC Order* at 1-2 (Ex. 4).

the construction and improvement plans and the cost of such plans,<sup>63</sup> Choice merely offers insufficient vague assertions. In particular, Choice alleges that it will introduce the supported services within a reasonable period of time,<sup>64</sup> but it fails to provide a construction timeframe or a commitment to provide “annual reporting of progress towards build-out plans.”<sup>65</sup> Choice also neglects to provide “specific commitments to construct new [radio] sites in areas outside its network coverage.”<sup>66</sup> Instead, Choice offers vague assurances that it will “[e]nhance and [i]mprove” existing facilities and states that it “has identified several projects ... that would be directly funded with high cost support.”<sup>67</sup> Yet, Choice fails to document the locations and types of its supposed facilities. In addition, Choice provides no description of the projects, nor a demonstration that it has the means to fund these projects.

Nor has Choice “provided detailed information on how it will use universal service support to construct [radio] sites throughout the states in which it is designated as an ETC.”<sup>68</sup> Similarly, Choice has not “provide[d] the location by study area of new [radio] sites, timeframe for commencement and completion of build-out plans, populations served by new [radio] sites, and cost of build-out plans.”<sup>69</sup>

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<sup>63</sup> See generally *Nextel Partners Updates to Supplement*.

<sup>64</sup> *Choice Application* at 24.

<sup>65</sup> *Nextel Partners Order* at 16535 (¶ 11).

<sup>66</sup> *Id.*

<sup>67</sup> *Choice Application* at 23.

<sup>68</sup> *Nextel Partners Order* at 16535 (¶ 11 & n.31); see also *Advantage Cellular Order* at 20989-90 (¶ 12 & n.36) (“Advantage Cellular has provided detailed information on how it will use universal service support to expand its CMRS coverage throughout Tennessee”).

<sup>69</sup> *Nextel Partners Order* at 16535 (¶ 11 & n.31); see also *Advantage Cellular Order* at 20989-90 (¶ 12 & n.36) (“Specifically, Advantage Cellular has provides the location by wire

Under the Commission's precedent, Choice's vague assertions that an applicant will provide service are inadequate. For example, Saipancell already provided the supported telecommunications services in most of its territory, but did not detail its plans for rolling-out service in areas it did not already serve. Saipancell claimed that it need only demonstrate that it *could* meet the ETC requirements in those areas upon designation.<sup>70</sup> The Commission, however, rejected Saipancell's position and required Saipancell to submit estimates for constructing facilities, including in those areas it did not yet serve before granting ETC status.<sup>71</sup>

The only additional commitments Choice makes are promises that it cannot possibly fulfill. While Choice "commit[s]" to "abide by the CTIA's Consumer code", to "serve all customers within its service area", and to provide "quality service".<sup>72</sup> Choice's own employees indicate that Choice does not provide any wireless telephone service, much less a supported telecommunications service.<sup>73</sup> Because Choice does not even satisfy the *minimum* statutory requirements for a successful ETC application, its commitments should be disregarded.

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center of cell towers on which it plans to lease space, the timeframe for commencement of its cell tower leasing, the populations served by new cell sites, and the cost of build-out plans.").

<sup>70</sup> *Fourth Amendment to Petition for Designation as an Eligible Telecommunications Carrier* of Saipancell, CC Dkt. No. 96-45 at 3 (filed Jan. 22, 2003).

<sup>71</sup> On March 9, 2004 Saipancell, in response to the *Virginia Cellular Order* and at the Commission's request, amended its application to commit "to construct three to five new cell sites on the island of Rota, and one to two sites on the island of Tinian." Letter from David A. LaFuria, Counsel to Saipancell to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 96-45 at 1, 4-5 (filed Mar. 9, 2004). The Commission, not satisfied with Saipancell's further commitments, requested "detailed information regarding the nature and location of the proposed facilities that were referred to in the March 9 Amendment." *Saipancell Letter* at 2. Saipancell then filed a supplement describing for each proposed facility, the location, type of construction, estimated cost, and population to be served. *Id.* at Exh. A.

<sup>72</sup> *Choice Application* at 22-23.

<sup>73</sup> Parrish Declaration at 1-2 (Ex. 1).

<sup>74</sup> Parrish Declaration at 1-2 (Ex. 1).

**C. Choice Does Not Advertise Any Supported Services.**

Section 214(e)(1)(B) of the Act requires that ETC applicants “advertise the availability of such services and the charges therefor using media of general distribution.”<sup>75</sup> Choice alleges that it “will advertise the supported services.”<sup>76</sup> Given that Choice has not established that it provides any supported telecommunications services today—and has provided no concrete plans or real commitments to do so—its claim is suspect.

**IV. CHOICE’S APPLICATION IS NOT IN THE PUBLIC INTEREST.**

**A. Choice Fails To Satisfy Its Burden Of Proof To Demonstrate That Its Application Is In The Public Interest.**

In determining whether the public interest is served, the Commission places the burden of proof upon the ETC application.<sup>77</sup> Choice claims that its Application is in the public interest for the five following reasons: (1) consumers will benefit from Choice’s service offerings;<sup>78</sup> (2) there will be “at most” a “minimal impact on the Universal Service Fund”;<sup>79</sup> (3) Choice’s service offers “unique advantages”;<sup>80</sup> (4) it will provide high quality services;<sup>81</sup> and (5) creamskimming is not a concern.<sup>82</sup> An examination of Choice’s arguments reveals that Choice’s claims are unsubstantiated, riddled with internal inconsistencies, and misstate the facts and competitive

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<sup>75</sup> 47 U.S.C. § 214(e)(1)(B).

<sup>76</sup> *Choice Application* at 15.

<sup>77</sup> *Highland Cellular Order* at 6432 (¶ 22).

<sup>78</sup> *Choice Application*, at 18-20.

<sup>79</sup> *Id.* at 20.

<sup>80</sup> *Id.* at 20-21.

<sup>81</sup> *Id.* at 21-24.

<sup>82</sup> *Id.* at 24.

conditions in the U.S. Virgin Islands. In the end, Choice fails to carry its burden under any conceivable public interest standard.

The Act imposes heightened scrutiny for applicants seeking ETC status in an area served by a rural telephone company. As the Joint Board explained, in addition to examining whether the applicant provides the supported services identified above, “for areas served by a rural carriers, the Act requires a separate finding that designation of an additional ETC is in the public interest.”<sup>83</sup> Under the Act, a state commission “*may*” but is not required to grant ETC status to more than one carrier in an area served by a rural carrier.<sup>84</sup> By contrast, for non-rural areas, Congress mandated that the state commissions “*shall*” grant ETC applications if the applicant is a telecommunications carrier, provides services supported by universal service, and commits to advertising such services.<sup>85</sup>

As the Joint Board recognized, the distinction between the statutory tests for rural and non-rural carriers “demonstrate[s] Congress’s recognition that *supporting competition might not always serve the public interest in areas served by rural carriers*, and Congress[’s] intent that state commissions exercise discretion in deciding whether the designation of an additional ETC services the public interest.”<sup>86</sup> While Congress did not establish an exact criteria for the public interest test, “it is clear that the public interest must be analyzed in a manner that is consistent with the purposes and goals of the Act itself.”<sup>87</sup> Congress thus made clear that it is appropriate

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<sup>83</sup> *Recommended Decision* at 4272 (¶ 37).

<sup>84</sup> 47 U.S.C. § 214(e)(2).

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Recommended Decision* at 4273 (¶ 38) (emphasis added).

<sup>87</sup> *Id.* (¶ 39).

from a policy perspective that a rural area have only one ETC and potential applicants in rural areas must make a strong public interest showing before an additional ETC designation will be granted.

In the *Virginia Cellular Order*, the FCC stated that, in determining whether an ETC application in a rural area is in the public interest, it weighs “[1] the benefits of increased competitive choice, [2] the impact of the designation on the universal service fund, [3] the unique advantages and disadvantages of the competitor’s service offering, [4] any commitments made regarding quality of telephone service, and [5] the competitive ETC’s ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.”<sup>88</sup> In addition, the Commission examines whether the benefits of an additional ETC in a rural area outweigh potential harms.<sup>89</sup> In this case, it is clear that the harms of granting Choice ETC status far outweigh any speculative benefits.

In addition to the criteria above, the Joint Board’s Recommended Decision found that it would be appropriate for state commissions to “consider the level of federal high-cost support to be received by ETCs” because “[p]er-line support is a single ‘marker’ that encompasses various underlying factors that may impact the determination of whether it is in the public interest” to grant the ETC application.<sup>90</sup> Other relevant public interest considerations include the “topography, population density, line density, distance between wire centers, loop lengths and levels of investment” of the rural carrier and its study area.<sup>91</sup> Given the regulatory uncertainty in

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<sup>88</sup> *Virginia Cellular Order* at 1575-76 (¶ 28); see also *Highland Cellular Order* at 6432 (¶ 22) (same).

<sup>89</sup> *Virginia Cellular Order* at 1575-76 (¶ 28).

<sup>90</sup> *Recommended Decision* at 4274 (¶ 43).

<sup>91</sup> *Id.*

this area and the rising size of the universal service fund,<sup>92</sup> the Commission should not disregard these factors in evaluating whether Choice’s application satisfies the statutory test—especially when the Commission’s decision on the Joint Board’s recommendation is due in a matter of days. If the FCC does not deny Choice’s Application, the Commission should, at a minimum, request additional information from Choice to evaluate whether it meets this criteria to ensure that Choice is capable and has the financial ability to serve as an ETC in the U.S. Virgin Islands.<sup>93</sup>

**B. Choice Does Not Provide Any Competitive Benefits.**

In examining competitive benefits of an ETC application, the inquiry is limited to an analysis of the competitive benefits of any supported telecommunications services offered by the ETC applicant.<sup>94</sup> Choice’s Application focuses on its current information and video services offerings and its paging service, and fails to establish that it provides any competitive benefits for supported telecommunications services.

Choice claims to be a “wireless” carrier,<sup>95</sup> but the evidence indicates that it is a wireless information service and video provider, not a wireless telecommunications carrier.<sup>96</sup> All of the advertisements Choice submitted as evidence of its existing services are for information

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<sup>92</sup> Innovative also respectfully requests that the Commission “continue to be mindful of the impact on the universal service fund due to the rapid growth in the number of competitive ETCs.” *Federal-State Joint Board on Universal Service, Sprint Corporation Application for Designation as an Eligible Telecommunications Carrier in the State of Alabama*, Order, CC Dkt. No. 96-45, DA 04-3617, ¶ 17 (rel. Nov. 18, 2004).

<sup>93</sup> Innovative has submitted proposed Interrogatories for the Commission’s convenience. *See* Ex. 2.

<sup>94</sup> *See e.g., Virginia Cellular Order* at 1576-77 (¶¶ 29-30) (examining competitive benefits of providing customer access to wireline telephone that do not otherwise have such access).

<sup>95</sup> *Choice Application* at 6.

<sup>96</sup> *See* Parrish Declaration at 1-2 (Ex. 1).



services—including wireless Internet access and wireless cable.<sup>97</sup> Although Choice’s website includes a vague invitation to call and learn more about its SMR services<sup>98</sup> a local businessperson’s attempts to obtain additional information regarding Choice’s SMR service revealed that Choice does *not* offer any wireless or wireline telephone service to customers on the U.S. Virgin Islands. Thus, Choice’s statements to the contrary are unsubstantiated.<sup>99</sup>

Similarly, the only services that Choice alleges to be “unique”<sup>100</sup>—wireless Internet access services—are neither “unique” nor are they supported telecommunications services. In the U.S. Virgin Islands, three entities in addition to Choice are providing wireless Internet access.<sup>101</sup>

Moreover, Choice misrepresents the state of competition in the U.S. Virgin Islands. Virgin Islands’ consumers already benefit from vibrant telecommunications competition with telecommunications carriers offering voice grade services and competing directly with Innovative Telephone. In particular, there are four active wireless telecommunications carriers in the U.S. Virgin Islands—including major carriers such as Cingular, Sprint PCS, Centennial and an affiliate of Innovative. Wirefree Partners III, LLC, a partnership of Sprint, recently bid

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<sup>97</sup> See *Choice Application*, Ex. 4.

<sup>98</sup> See Ex. 6. Curiously, it appears that Choice’s website was changed recently to indicate, under “mobile” services, that it offers some two-way voices services. Even so, Choice does not provide any detail, services or plans. Instead, under its “SMR” service, Choice continues to invite interested entities to call for more information.

<sup>99</sup> To support its position that competitive choices are in the public interest, Choice cites an unopposed ETC application for a government-owned LEC decided under a previous public interest standard. As a result, for the proposition cited by Choice, the case is irrelevant. See *Choice Application* at 18, n.45.

<sup>100</sup> *Choice Application* at 20-21.

<sup>101</sup> See advertisements from SurfVI and Communications Technologies, Inc., (“COMTek”) attached hereto as Exhibit 7 (“Ex. 7”). An affiliate of Innovative also offers the wireless service.

over \$1,400,000 for spectrum in the FCC's Auction 58 for spectrum in the U.S. Virgin Islands.<sup>102</sup>

None of these carriers applied for or needed universal service support to enter the market. In addition, Innovative has a resale agreement with a carrier for the provision of wireline telephone services in the U.S. Virgin Islands. This carrier, Jilapuhn Inc. d/b/a Caribbean Telecom, offers tariffed wireline telecommunications services throughout the U.S. Virgin Islands.<sup>103</sup>

Marketplace evidence refutes Choice's claim that it is "economically impossible" for a competitive carrier to offer telecommunications service in the U.S. Virgin Islands without universal service support.<sup>104</sup> Actual market evidence confirms that it is both economic and feasible for carriers to enter the market without such support.<sup>105</sup>

**C. Granting The Application Will Undermine The Universal Service Fund.**

Choice's second claim that there will be "at most" a "minimal" impact on the Universal Service Fund is disingenuous at best.<sup>106</sup> Choice fails to provide the FCC with any concrete evidence or analysis to evaluate the validity of Choice's claim. Rather, Choice's entire rationale

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<sup>102</sup> *Broadband PSC Spectrum Closes*, Public Notice, DA 05-459 at Att. A, p. 11 (rel. Feb. 18, 2005).

<sup>103</sup> *See Caribbean Telecom*, <http://www.jilapuhninc.com/caribbeantelecom.htm> (last visited Feb. 14, 2005). A copy of Caribbean Telecom's tariff is available at <http://www.jilapuhninc.com/tariffs2.htm>. (last visited Feb. 14, 2005).

<sup>104</sup> *See Choice Application* at 5; *see also id.* at 19 ("Without ETC status and USF support, competition in the U.S. Virgin Islands ... is not economically feasible"). Ironically, Choice undermines its own argument by claiming that it can serve the U.S. Virgin Island more "economically" using wireless facilities because it is cheaper to serve certain areas via wireless than wireline service. *Choice Application* at 24.

<sup>105</sup> Choice mentions Innovative's statutory-conferred rural exemption from Section 251(c) of the Act. *See* 47 U.S.C. § 251(f)(1). *See Choice Application* at 4 & nn. 5, 7. Choice neglects to mention that Choice filed a petition to eliminate Innovative's rural exemption. The Virgin Islands Public Services Commission denied Choice's request, finding that terminating the rural exemption could undermine universal service in the U.S. Virgin Islands. *See* p. 32, *infra*.

<sup>106</sup> *Id.* at 20 (emphasis omitted).

stems from its claim that the “total USF support for the U.S. Virgin Islands is a small fraction of the total fund allocated to carriers.”<sup>107</sup> Such an argument is wholly unavailing—every ETC applicant could make this same argument with respect to their individually requested service territory.<sup>108</sup>

Congress did not create the ETC program to funnel money to information service providers such as Choice. Yet, Choice indicates that it will use the universal service funds to “expand its data capabilities and facilities.”<sup>109</sup> Expanding data capabilities, which are not supported telecommunications services, violates the rules and certification requirements governing the use of funds used to provide supported telecommunications services.<sup>110</sup>

Nor has Choice shown that granting its Application will further any of the goals of advancing universal service. Choice has not demonstrated that it has or will provide service to underserved areas of the U.S. Virgin Islands to residential consumers that may not have the funds to purchase wireless service today. Choice relies almost exclusively on its alleged provision of service to one customer who has means to live on the semi-private Little St. James Island. Even so, Choice does not document how it provides service to Little St. James Island

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<sup>107</sup> *Id.*

<sup>108</sup> Moreover, the Commission found that examining the impact of just one ETC leads to “inconclusive” results. *Virginia Cellular Order* at 1577 (¶ 31 & n.96). The Joint Board recommended that commissions consider the level of federal high-cost support to be received by ETCs because such analysis could render an otherwise valid ETC application inconsistent with the public interest. *Recommended Decision* at 4274 (¶ 43). Thus, the Commission should examine closely the impact that Choice’s Application would have on the USF.

<sup>109</sup> *Choice Application* at 23.

<sup>110</sup> To this end, state commissions (or ETCs themselves when such ETCs are not subject to state jurisdiction as in the case here) must certify that “high-cost support received by the competitive ETC will be used ‘only for the provision, maintenance, and upgrading of facilities and services for which support is intended.’” 47 C.F.R. § 54.313(b); 47 C.F.R. § 54.314(b).

nor does it demonstrate that it has the means to provide service to all interested consumers throughout the U.S. Virgin Islands.<sup>111</sup>

**D. Choice Does Not Offer Any “Unique Advantages,” But Has Many Disadvantages.**

Choice’s third argument—that it is in the public interest to grant its Application because it allegedly offers “unique advantages”<sup>112</sup>—is likewise unfounded. First, the only “unique” service it claims to offer is wireless broadband<sup>113</sup>—an information service that is already offered by three other providers on the U.S. Virgin Islands.<sup>114</sup> Second, information services have no bearing on the ETC public interest inquiry. Third, even if the service were “unique,” which it is not, Choice fails to cite any precedent that supports a finding that an ETC application is in the public interest merely because the applicant claims to offer a “unique” non-supported service.

In addition, Choice makes a vague reference to expanding its service to provide some undefined wireless service, but fails to provide any plans, documentation, or details about these unspecified plans. As noted above, even before the Commission created a heightened standard in the *Virginia Cellular* and *Highland Cellular Orders*, the Commission “caution[ed] that a demonstration of the capability and commitment to provide service *must encompass more than a vague assertion of an intent on the part of the carrier to provide service.*”<sup>115</sup> Yet, this is all Choice’s Application provides. Thus, Innovative is unable to comment on whether Choice’s

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<sup>111</sup> As noted above, the evidence indicates that Choice does not offer wireless or wireline telephone service in the U.S. Virgin Islands. See Parrish Declaration at 1-2 (Ex. 1).

<sup>112</sup> Choice Application at 20.

<sup>113</sup> *Id.*

<sup>114</sup> See Ex. 7.

<sup>115</sup> *Western Wireless Decision* at 15178 (¶ 24) (emphasis added).

plans are feasible or already offered by Innovative or another carrier on the U.S. Virgin Islands. Further, Choice does not submit any information on the reliability of its services or whether it currently serves any residential consumers that qualify for Lifeline or Link-Up.<sup>116</sup> All Choice's Application indicates is that granting its Application will further erode the universal service fund.

**E. Choice's Commitments Regarding High Quality Services Are Inadequate.**

Choice's fourth argument—that it is making a commitment to provide high quality services throughout the U.S. Virgin Islands—fares no better.<sup>117</sup> As noted above, Choice's "commitments" are illusory and fail to provide sufficient information to back up its bare claims.<sup>118</sup> For example, Choice promises that it will comply with the CTIA Consumer Code,<sup>119</sup> but Choice has not demonstrated that it provides wireless telephone service, rendering this commitment meaningless. Likewise, Choice fails to provide any documentation to support its other alleged commitments, such as enhancing and improving its facilities and serving all customers. Rather, it appears that Choice merely cut and paste the commitments made by other applicants without providing the correlating support necessary to ensure that such commitments are real. The Commission should therefore give these "commitments" no weight.

In contrast to Choice's illusory "commitments," Innovative is committed to improving facilities and service in the U.S. Virgin Islands. Whereas Choice claims that it has invested some

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<sup>116</sup> As noted *supra* pp. 15-16, Choice also fails to explain how it will participate in and contribute to the local Lifeline and Link-Up funds when, according to the VIPSC, Choice "expressed no willingness to subject itself to the jurisdiction of the VIPSC." See *Choice Application*, Ex. 3, at n.1.

<sup>117</sup> *Choice Application* at 21-24.

<sup>118</sup> See pp. 16-18, *supra*.

<sup>119</sup> *Choice Application* at 22-23.

\$18 million in its Internet and cable facilities,<sup>120</sup> Innovative invested over \$150 million upgrading its U.S. Virgin Islands telecommunications facilities in the last ten years alone. For example, Innovative is investing in new digital microwave equipment between St. Thomas and St. John and an underwater fiber optic cable between St. Thomas and St. Croix.<sup>121</sup> In 2004, Innovative announced that it will spend \$100 million in the next five years to improve even further the telecommunications infrastructure in the U.S. Virgin Islands.<sup>122</sup> Innovative's five-year plan "includes laying fiber optics cables, installing more lines underground" and other outside plant upgrades to "create redundancies in the system, [which will] giv[e] data alternative routes in case a main line is damaged." Innovative is also committed to improve continually its customer service. To this end, in 2004, Innovative opened a new customer service center offering customers a one-stop shop for all their telecommunications needs.<sup>123</sup>

Innovative's investment has turned into greater broadband offerings to residents of the Virgin Islands. The number of DSL subscribers, for example, has increased exponentially. Indeed, since 2002, the number of DSL subscribers has increased almost 500 percent. Thus, Choice's claim that "[w]ithout any competition, Innovative does not have any incentive to improve the quality of its own network"<sup>124</sup> is, once again, disproved by marketplace evidence.<sup>125</sup>

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<sup>120</sup> *Id.* at 24.

<sup>121</sup> Tim Fields, *Innovative Telephone Co. Is Planning \$100 Million in Infrastructure Upgrades*, THE DAILY NEWS, March 4, 2005, at 13 ("\$100 Million Investment"), attached hereto as Exhibit 8 ("Ex. 8").

<sup>122</sup> *Id.*; see also Tim Fields, *High-Tech Telecom Services Ahead For St. John: Innovative Telephone Beings Project Worth \$5 million To Upgrade and Expand Infrastructure and Improve Availability*, THE DAILY NEWS, May 17, 2004, attached hereto as Ex. 8.

<sup>123</sup> *Innovative Opens 'One-Stop Shop' in Estate Tutu*, THE DAILY NEWS, April 20, 2004, at 7, attached hereto as Ex. 8.

<sup>124</sup> *Choice Application* at 21.

**F. Choice’s Application Raises Significant Creamskimming Concerns.**

1. Choice Does Not Serve Innovative’s Entire Service Area.

The FCC rules require that, for territories served by a rural ILEC, the ETC applicant’s service area must be the same as the study area for the rural ILEC.<sup>126</sup> If the ETC applicant’s service area is not the same as the rural ILEC’s service area, the ETC applicant must submit a request to the Commission to redefine the rural ILEC’s service area.<sup>127</sup> In this case, Choice has not only failed to establish that its service area is identical to Innovative’s, but it also neglected to request that the FCC waive this requirement or otherwise redefine Innovative’s study area.

Choice’s Application carefully avoids stating that it serves Innovative’s entire service area. Rather, Choice claims that it is “authorized” to service the U.S. Virgin Islands Territory,<sup>128</sup> that its wireless network enables it to offer service to “large parts” (but not all) of St. Thomas, St. John, and St. Croix,<sup>129</sup> and that to Choice’s “knowledge” it believes that Innovative’s study area is the same as Choice’s coverage area.<sup>130</sup> Yet, Choice failed to provide any information regarding its actual network to enable the Commission to determine if Choice’s service area is the same as Innovative’s service area. Choice did not provide a map indicating where its towers

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<sup>125</sup> Nor is there any merit to Choice’s unsupported claim that Innovative’s system has “frequent outages” or operates beyond capacity. *Choice Application* at 21. Even the paltry support that Choice does cite is taken out of context. Choice cites examples from the aftermath of hurricanes and natural disasters—which bear no reflection on the day-to-day operations of Innovative nor its unwavering commitment to improving service. Indeed, Innovative invested in burying cables to improve reliability during storms. *See \$100 Million Investment* (Ex. 8).

<sup>126</sup> 47 C.F.R. § 54.207(b).

<sup>127</sup> 47 C.F.R. § 54.207(c).

<sup>128</sup> *Choice Application* at 17, 24.

<sup>129</sup> *Id.* at 14.

<sup>130</sup> *Id.* at Ex. 1.

are located, what area(s) these towers serve, what areas lack coverage, and other pertinent information. Rather, Choice provides simply what appears to be a general atlas map of the U.S. Virgin Islands.

More fundamentally, Choice's representations to this Commission are not consistent with its sworn Interrogatories to the VIPSC. Before the VIPSC, the VIPSC's Staff, in evaluating Choice's ETC application, asked Choice to explain how it satisfies the eligibility requirements set forth in Section 214(e) of the Act. In response, Choice stated that "Choice's licensed service area is *not identical to Innovative's service area*" and that "as is common practice, *Choice will request a waiver* of the requirement [Rule 54.207(c)] to provide service throughout Innovative's study area, such that it can operate pursuant to the terms of its FCC licenses."<sup>131</sup>

In this filing, Choice has not indicated that there have been any changes to its FCC licenses since it filed its Interrogatory responses to the VIPSC on July 18, 2003 that would warrant a dramatic reversal of Choice's position. Innovative's review of the FCC's licensing system reveals no changes to Choice's licenses during this time. If, as Choice indicated in sworn statements to the VIPSC, Choice is seeking a waiver of Section 54.207(c), it failed to so indicate rendering its Application procedurally faulty and necessitating denial.

Moreover, even assuming, *arguendo*, that Choice could establish that it is "licensed" or "authorized" to serve Innovative's study area, such authorization does not mean that Choice has the facilities and towers in place to actually serve Innovative's entire service area today or in the future. Such glaring oversight stands in sharp contrast with other ETC applications. For

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<sup>131</sup> See Choice Communications LLC Responses to Staff Interrogatories (Track 1), Requests of Choice Communications LLC, VIPSC Dkt. No. 548 at 10, n.8 (filed July 18, 2003) (emphasis added) (attached hereto as Exhibit 9 ("Ex. 9")). Choice further claimed, without support, that the "FCC routinely grants such requests." *Id.*



example, Highland Cellular established (unlike Choice) that it offered wireless telephone service and its FCC license permitted it to serve the entire service area of the rural ILEC.<sup>132</sup> Even so, Highland Cellular committed “to construct[] new cellular sites in sparsely populated areas within its licensed service area but outside its existing network coverage” to ensure that the goals of universal services were furthered.<sup>133</sup> The Commission made this commitment a condition of Highland Cellular’s grant of ETC status.<sup>134</sup> Choice’s submission, by contrast, is so deficient that its Application should be denied in its entirety.

2. There Is No Evidence To Suggest That Choice Will Not Creamskim Innovative’s Business Customers.

Choice claims that because it is “authorized to serve the entire U.S. Virgin Islands territory, designating Choice an ETC does not raise any creamskimming concerns; Choice will not serve solely high margin customers.”<sup>135</sup> As noted above, Choice stated before the VIPSC that its licensed service area is *not* the same as Innovative—thereby refuting the entire premises of its argument and raising serious creamskimming concerns. Even if Choice’s service area were the same as Innovative’s, which Choice itself has not shown to be true, Choice’s perfunctory responses utterly fail to carry its burden of refuting the real concern that it will creamskim Innovative’s most lucrative business customers.

The Commission has explained that “[r]ural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company’s study

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<sup>132</sup> *Highland Cellular Order* at 6429 (¶ 15).

<sup>133</sup> *Id.* at 6430 (¶ 17).

<sup>134</sup> *Id.*

<sup>135</sup> *Choice Application* at 17.

area.”<sup>136</sup> Unlike previous ETC applications, Choice does not seek to obtain ETC status only for low density wire centers—which may alleviate creamskimming concerns.<sup>137</sup> Rather, Choice seeks ETC status for its entire licensed area. Thus, Choice has the potential and the incentive to target the most profitable business customers in the U.S. Virgin Islands.

Indeed, the VIPSC has found that, due to the nature of Innovative’s rates, with the business rates subsidizing the artificially-low residential rates, business customers “will likely be a focal point for competitive activity on the part of Wireless World [now Choice].”<sup>138</sup> The VIPSC also found it “reasonable” “that Innovative will respond with some effort to rebalance rates between residential and business customers to better reflect the revenues and costs of serving each of the respective groups,” which “may well result in an increase in local residential rates or the imposition of a subscriber line charge; in either case, an increase in the cost of basic local exchange service to the residential users of the Virgin Islands.”<sup>139</sup> Based on this evidence, the VIPSC concluded that such concerns created a serious risk of undermining universal service in the U.S. Virgin Islands—a risk that the VIPSC was not willing to take. The same concern is present here: there is no reason to suspect that Choice will not target the more lucrative customers—indeed, it makes prudent business sense to do so. Given that there already is a lower penetration rate of telephone service in the U.S. Virgin Islands than on the U.S. mainland even with a residential rate of \$22.00—not because services are not available but because the price is

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<sup>136</sup> *Advantage Cellular Order* at 20993 (¶ 20).

<sup>137</sup> *See e.g., id.* at 20992-96 (¶¶ 18-24); *Virginia Cellular Order* at 1577-80 (¶¶ 32-35).

<sup>138</sup> *See Report of the Hearing Examiner, Wireless World-Innovative Telephone Request for Interconnection*, VIPSC Dkt. No. 526 at 30 (May 22, 2001) (attached hereto as Exhibit 10 (“Ex. 10”)). Wireless World changed its name to Choice Communications, LLC.

<sup>139</sup> *Id.*

too high for residents<sup>140</sup>—any such increase in residential rates almost certainly would undermine universal service.

**G. Choice Fails To Submit Information Demonstrating That It Will Provide The Supported Services Within A Reasonable Timeframe.**

In the *Virginia Cellular Order*, the Commission explained that it would examine the “ETC’s ability to satisfy its obligation to serve the designated services areas within a reasonable period of time.”<sup>141</sup> Choice alleges without support that it would provide the services within a reasonable timeframe.<sup>142</sup> Unlike other ETC applicants,<sup>143</sup> Choice fails to provide any concrete evidence to support its claim. Once again, Choice’s bare statement is insufficient to carry its burden of proof.

**V. CONCLUSION**

In the end, Choice’s Application is woefully inadequate and utterly fails to demonstrate that it is a common carrier, provides or will provide and advertise the supported services or that its application is in the public interest. The evidence indicates that Choice does not even provide wireless or wireline telephone service today—and it would be unprecedented for the

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<sup>140</sup> *Id.*

<sup>141</sup> *Virginia Cellular Order* at 1576 (¶ 28).

<sup>142</sup> *Choice Application* at 23.

<sup>143</sup> As noted above, successful ETC applicants have provided a construction timeframe or a commitment to provide “annual reporting of progress towards build-out plans.” *Nextel Partners Order* at 16535 (¶ 11). Choice also fails to provide “specific commitments to construct new [radio] sites in areas outside its network coverage.” *Id.* Instead, Choice offers vague assurances that it will “enhance and improve” existing facilities and states that it “has identified several projects ... that would be funded with high cost support.” *Choice Application* at 23. However, Choice fails to document the locations and types of its supposed facilities. And, Choice provides no description of the projects it would fund. Its application stands in sharp contrast to other applicants who provided detailed plans for upgrading facilities and constructing new facilities, which included the timeframe for commencement and completion of the construction and improvement plans and the cost of such plans. See generally *Nextel Partners Updates to Supplement*.

Commission to grant ETC status in the territory of a rural carrier in such circumstances. In addition, Choice neglects to provide any concrete plans on how it will provide services it does not provide today, skirts around the issue of whether it services Innovative's entire service area, and cannot demonstrate any benefits that would result from granting its Application.

For the foregoing reasons, Innovative respectfully requests that the Commission deny Choice's Application for ETC status.

Respectfully submitted,

/s/ Gregory J. Vogt  
Gregory J. Vogt  
Rebekah P. Goodheart  
Amy E. Bender  
Wiley Rein & Fielding LLP  
1776 K Street, NW  
Washington, DC 20006  
202.719.7000

*Counsel to Innovative Telephone*

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